

FOR PUBLICATION

**DISTRICT COURT OF THE VIRGIN ISLANDS**

**DIVISION OF ST. CROIX**

ELLA LAWRENCE,

Plaintiff,

2006-CV-0045

v.

ALBERTO-CULVER USA, INC., and  
KMART CORPORATION,

Defendants.

TO: Gertrude LaCointe-Marius, Esq.  
Martial A. Webster, Esq.  
Nathania Bates, Esq.

**ORDER DENYING DEFENDANT KMART CORPORATION'S  
MOTION TO DISMISS FOR FAILURE TO POST SECURITY FOR COSTS**

THIS MATTER came before the Court upon Defendant Kmart Corporation's Motion to Dismiss For Failure to Post Security Costs, filed June 16, 2006. This order is issued without necessity of response.

Said Defendant bases its motion upon V.I. Code Ann. tit. 5 § 547. However, Judge Moore of the Division of St. Thomas and St. John, in *Mossman v. Moran*, Civil No. 2004-31, 2004 WL 1664010 (D.V.I. June 1, 2004), declared that said Virgin Islands statute does not apply to a diversity action in federal court. As explained by Judge Moore, "section 547 is clearly a rule of procedure rather than substance . . . ." *Id.* at \*3.

In *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), the United States Supreme Court held:

[E]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.

*Id.* at 78. Judge Reed, concurring, clarified, “The line between procedural and substantive law is hazy, but no one doubts federal power over procedure.” *Id.* at 92 (citing *Wayman v. Southard*, 10 Wheat. 1, 6 L.Ed. 253). Thus, in *Yohannon v. Keene Corp.*, 924 F.2d 1255, 1265 (3d Cir. 1991), the United States Court of Appeals for the Third Circuit articulated, “[A] federal court sitting in diversity must apply the law of the forum state to questions that are ‘substantive’ but must use federal rules to govern ‘procedural’ matters.” *Id.* at 92 (citing *Erie*, 304 U.S. at 92). Based upon the foregoing, Judge Moore concluded that Section 547 does not apply to diversity proceeding in this Court.

The Court agrees and find Section 547 to be procedural, and not substantive, in nature. The Court further finds Judge Moore’s reasoning persuasive and now holds that Section 547 does not apply to diversity proceedings in this Court.

Accordingly, it is now hereby **ORDERED** that Defendant Kmart Corporation’s Motion to Dismiss For Failure to Post Security Costs is **DENIED**.

ENTER:

Dated: June 20, 2006

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GEORGE W. CANNON, JR.  
U.S. MAGISTRATE JUDGE

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ATTEST:

WILFREDO F. MORALES

Clerk of Court

By: \_\_\_\_\_  
Deputy Clerk